Supreme Court, U.S.
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No. 98-1752

IN THE

Supreme Court of the United States

GRANDEOTTO, INC., a corporation;
BERNARD J. and KATHY A. FOLIO;
MID-CITY LAND CO.;
BERNARD J. FOLIO, d/b/a Highrise Associates;
KATHRYN FOLIO; JOSEPH FOLIO,

Petitioners,

v.

CITY OF CLARKSBURG, a municipal corporation,

Respondent.

On Petition for a Writ of Certiorari
to the West Virginia Supreme Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

GREGORY A. MORGAN
Counsel of Record
YOUNG MORGAN & CANN, PLLC
Attorneys for Respondent
Suite One, Schroath Building
229 Washington Avenue
Clarksburg, West Virginia 26301
(304) 624-5687

153215

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE

The City of Clarksburg is a community of about 19,000 people located in north central West Virginia, approximately 125 miles south of Pittsburgh, Pennsylvania, and 250 miles west of Washington, D.C. It is the seat of government for Harrison County, West Virginia. In 1983, under the authority of W. Va. Code § 8-13-13, Clarksburg enacted an ordinance providing for the payment of Fire Protection Service Fees by users of such services, such "users" being defined as the owners and tenants of the residential, commercial and industrial buildings within the city. The Ordinance was amended in 1985, 1989 and 1992, and is currently designated Article 957, Chapter 5, Part 9 of the Codified Ordinances of the City of Clarksburg, West Virginia, of 1981, as Amended.

Based on legislative findings that the size and use of a building are factors that directly affect the cost of providing fire protection services, Clarksburg devised a classification scheme that attempted to fairly distribute the cost of fire protection services. Owners of "residential unit structures" and "dual residential structures" are assessed a flat annual rate; owners of "multiple family residential structures" and "non-residential unit structures" are assessed at a rate based on square footage of the building; and tenants of non-residential unit structures were assessed at a lesser rate based on the square footage of the structure rented.

The sole purpose of the Fire Protection Service Fee is to defray the cost and expense of providing fire protection services to property owners within Clarksburg. The proceeds generated from the collection of the Fire Protection Service Fee are wholly earmarked to the fire department of

the City of Clarksburg. The fee generates approximately $750,000 in revenue per year, which covers approximately 42% of the fire department's annual budget of $1,809,000.

Petitioners are owners of residential and nonresidential structures within Clarksburg and are required to pay fees under the Ordinance. Since the enactment of the Ordinance in 1981, Petitioners have been engaged in eighteen years of almost constant litigation with Clarksburg. Petitioners have refused to pay the fees assessed against their properties, and challenged the validity of the Ordinance and its amendments in both West Virginia and Federal Courts, including the United States Court of Appeals for the Fourth Circuit, and the West Virginia Supreme Court of Appeals. These challenges have been uniformly unsuccessful. No court has found merit in the issues raised by the Petitioners. This appeal is the ultimate culmination of this fruitless litigation.

Petitioners' opposition to the Fire Service Fee was first litigated in a case styled *City of Clarksburg v. Grandeotto, Inc.*, Civil Action No. 84-C-698-1 (Circuit Court of Harrison County). Clarksburg initiated that action in October 1984, to recover unpaid fire service fees. Grandeotto, Inc., a defendant therein and also one of the Petitioners, argued that the Fire Protection Service Fee violated West Virginia's Tax Limitation Amendment (W. Va. Const. Art. X § 1) and that it was unreasonably related to the service provided. By Order entered August 12, 1985, the circuit court rejected such claims and upheld the Ordinance. Grandeotto thereafter filed a Petition for Appeal to the West Virginia Supreme Court of Appeals, which was refused. (*See* Findings of Fact Nos. 45, 46, 47, 48, Memorandum of Decision A. 46).

In 1993 and 1994, Clarksburg commenced seven individual actions against the Petitioners to collect unpaid fire service fees for the years 1990 through 1993. These actions were consolidated by the circuit court. After extensive discovery, the parties each made Motions for Summary Judgment. On July 24, 1997, the court entered its Memorandum of Decision and Order granting Clarksburg judgment against each of the Petitioners for unpaid fees and penalties. The Petitioners then appealed to the West Virginia Supreme Court of Appeals, which, by Order entered on May 14, 1998, agreed to hear their appeal. Subsequently, this case (designated No. 25143) was consolidated with appeals from Ohio County and Cabell County, West Virginia, which concerned challenges to similar Fire Protection Service Fee ordinances of the cities of Huntington and Wheeling. In those cases, however, the property owners challenging the ordinances were the Catholic Diocese of Wheeling-Charleston (Nos. 25401 and 25402), Wheeling College and the Ohio County Board of Education (No. 25402). These property owners claimed, in part, that because their churches and schools are exempt from West Virginia's *ad valorem* property tax under West Virginia Code § 11-3-9, such buildings should also be exempt from the municipal fire protection service fees of Huntington and Wheeling, respectively. In its decision of December 15, 1998, the West Virginia Supreme Court of Appeals rejected that, and all other arguments made by the property owners. Only these Petitioners have appealed that decision to this Court.[1]

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1. Contrary to the Petitioners' assertion that the West Virginia Supreme Court upheld the fire protection service fees in all three of the cases by a vote of 3 to 2 (Petition Pg. 5), the vote was unanimous as to these Petitioners. In footnote 1 of the dissenting

(Cont'd)

In August 1997, Clarksburg was forced to institute yet another civil action against the Petitioners for unpaid fire service fees for the years 1994 through most of 1997 in Harrison County Circuit Court, designated Civil Action 97-C-366-1. That case has been stayed pending the outcome of this action.

In 1996, concurrent with the long pendency of this case, the Petitioners instituted what they describe as a "parallel" challenge to Clarksburg's Ordinance in the United States District Court for the Northern District of West Virginia, in which they asserted, among other things, that Clarksburg's Ordinance, as it is related to fire protection, violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and sought both declaratory and injunctive relief. That case was dismissed by the district court for lack of subject matter jurisdiction, pursuant to the Tax Injunction Act, 28 U.S.C. § 1341, upon Clarksburg's Rule 12(b)(1) F.R.C.P. Motion.

The Petitioners appealed the dismissal of their so called "parallel" challenge to the United States Court of Appeals

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(Cont'd)
opinion, Justice Maynard specifically noted that his dissent (in which Justice McCusky joined) was limited to

> . . . Case Nos. 25401 and 25402 involving the Roman Catholic Diocese, schools and schools and boards of education. I believe there is no reason the appellants in Case No. 25313 [the Petitioners herein] should not pay the "fee" at issue since, unlike churches and schools, they are not exempted under W.Va. Code § 11-3-9.

(App 15.)

for the Fourth Circuit. The Fourth Circuit upheld the district court's dismissal, finding that the Tax Injunction Act barred jurisdiction and rejecting all of Petitioners' claims. *Folio v. City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998) (A.33).

REASONS FOR DENYING THE WRIT

This Petition does not deserve the attention of this Court. The essence of Petitioners' argument is that their various challenges to the Fire Protection Service Fee have been improperly rejected or ignored by every West Virginia and federal court which has heard such claims. With the filing of the Petition before this Court, Petitioners have challenged the validity of Clarksburg's Fire Protection Service Fee in every possible West Virginia and federal court. No court has found merit in any of these attacks.

Throughout each stage of this litigation, the Petitioners have asserted that the court immediately below has failed to "follow its constitutional duties" or acted in an arbitrary and/or unfair fashion in rejecting the Petitioners' various (and ever changing) objections to Clarksburg's Fire Protection Service Fee Ordinance. Then, after being rebuffed once again, they make similar complaints to the next level of appeal. The Petition is simply more of the same, and sets forth no valid ground that would justify a granting of certiorari by this Honorable Court.

I.

IN THIS APPEAL, THE CENTRAL QUESTION ADDRESSED BY THE WEST VIRGINIA SUPREME COURT IS SOLELY A QUESTION OF STATE LAW, AND NO FEDERAL QUESTION EXISTS.

The Petitioners' position is, essentially, that the Fire Protection Service Fee cannot be a "fee" under state law, (for the purposes of the West Virginia Tax Limitation Amendment) while being classified as a "tax" in federal court for the purposes of either the Tax Injunction Act, as in *Folio v. City of Clarksburg*, or under the Supremacy Clause, as in *United States v. Huntington*, 999 F.2d 71 (4th Cir., 1993), *cert. den.*, __ U.S. __, 114 S. Ct. 1048, (1994). Petitioners assert that the two court systems have somehow violated their "federal due process" rights by reaching decisions which are "polar opposites" or "diametrically opposed." This position is clearly meritless. The West Virginia and federal courts have simply applied different bodies of law to answer what are clearly different questions.

The Petitioners' obsession with the label given to the fire protection service fee assessment (tax vs. fee) is not relevant in this appeal, because that distinction is meaningful only under West Virginia law. The West Virginia Constitution, Art. X, § 1 (the Tax Limitation Amendment) limits the level of *ad valorem* property taxation which may be levied on real property. Petitioners argued below that the Fire Protection Service Fee is a "tax" (presumably related to value) and therefore violates the Tax Limitation Amendment. This proposition was explicitly rejected below by the West Virginia Supreme Court relying

on its decision in *Bacon v. Huntington*, 196 W. Va., 457, 473 S.E.2d 743 (1996). Petitioners nonetheless persist in raising this inapplicable argument before this Court. They have attempted to manufacture a federal question by reinventing the "tax vs. fee" issue as an unconstitutional "taking," but offer no authority supporting that proposition. In reality, there is nothing for this Court to decide because the question is solely one of state law. It simply does not matter whether the Fire Protection Service Fee is a "fee" or a "tax" because no federal question is presented herein. This Court has long made clear its reluctance to interfere with the revenue generation efforts of the states, and that it will do so only under circumstances when a measure imposed by a state has clearly violated limitations imposed by the United States Constitution. *King v. Mullins*, 171 U.S. 404 (1898); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940).

The Petitioners' position below as to this issue is based on a clear misapplication of the relevant standards. The West Virginia Supreme Court of Appeals resolved the issue of whether the Clarksburg Fire Protection Service Fee is in violation of Article X § 1 of the West Virginia Constitution, also known as the "Tax v. Fee" issue, in the 1996 case *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996), and reaffirmed that decision in this case. Below, the Petitioners argued that Clarksburg's Fire Protection Service Fee is, in reality, an *ad valorem* tax rather than a municipal fee and, therefore, violates the Tax Limitation Amendment. Petitioners' argument is substantially based upon their total mischaracterization of the holding in *United States v. Huntington*, 999 F.2d 71 (4th Cir. 1993). In that case, the Fourth Circuit held that Huntington's municipal service fee could not be assessed against Federally

owned property within Huntington's corporate boundaries, on the grounds United States has immunity from taxation by a state or its political subdivision, pursuant to the Supremacy Clause (Art. VI, cl 2.). This general principle was, of course, first articulated by Chief Justice Marshall in the seminal opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Subsequently, in *Bacon*, private property owners from Huntington asserted that the Fourth Circuit's ruling collaterally estopped Huntington from assessing its municipal service fee against them, because as a "tax," and not a "fee" the assessment would violate the Tax Limitation Amendment. The West Virginia court considered and rejected that assertion, holding:

> An ordinance which imposes a municipal service fee pursuant to *W. Va. Code*, 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W. Va. Const.* Art. X, § 1.

City of Huntington v. Bacon, 196 W. Va. 457, 473 S.E.2d 743, 753-54 (1996).

Bacon not only specifically recognized the immunity provided by the Supremacy Clause to the federal government, and its intstrumentalities from state and local taxation but also that the determination of what is and is not a "tax" for that purpose resides solely in the federal courts. Conversely, the *Bacon* court acknowledged that this Court has made it clear that the states are free to choose their own fiscal policies:

> The state is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as federal power is concerned, to the constricting regulations of the Constitution of the United States.

City of Huntington v. Bacon, 473 S.E.2d at 750, *citing Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 151 (1911). Accordingly, the West Virginia Supreme Court determined that it was not bound by the Fourth Circuit's determination in *United States v. Huntington* insofar as non-federally owned property is at issue. Since the *Bacon* appellants were not federal instrumentalities, no "Federal Right" was involved and, therefore, the Constitutional immunity granted to the United States did not extend to private property owners.

Petitioners' failure to qualify as an instrumentality or agency of the government of the United States is no deterrent to their desire to apply the Fourth Circuit's decision in *United States v. City of Huntington* to themselves. They continue to misconstrue the West Virginia Supreme Court's use of the term "federal right," by using it to refer to their own constitutional rights (Pet. 14-17). By this twisted logic Petitioners assert that since they have made constitutional due process and equal protection claims in this appeal, which they incorrectly say were not asserted by the appellants in *Bacon*, the Fourth Circuit's decision in *United States v. Huntington* applies to them and, therefore, the fire service protection fee is, in reality, a "tax" and, therefore, a "taking" of their property.

Thus Petitioners assiduously avoid the crux of the distinction between the Fourth Circuit's review of Huntington's municipal service fee and the analysis of the West Virginia court in *Bacon*, which is that the term "federal rights" in this context means the absolute immunity from state taxation provided to the federal government and its instrumentalities, rather than the rights afforded all citizens under the United States Constitution. It is not here suggested that the Petitioners' constitutional claims should not be given their due consideration. It is only pointed out that those courts were considering an entirely different body of law. Petitioners' attempt to take the term "federal right" out of context and attempt to distinguish themselves from the *Bacon* appellants is simple nonsense.

II.

THE WEST VIRGINIA COURTS PROVIDED PETITIONERS WITH FULL AND FAIR OPPORTUNITY TO ARTICULATE THEIR CLAIM THAT CLARKSBURG'S ORDINANCE IS CONSTITUTIONALLY DEFECTIVE.

Petitioners attempt to attract this Court's attention by characterizing their challenge to the Fire Protection Service Fee as a violation of their constitutional rights coupled with an unjust refusal of any of the numerous courts which have heard their claims to sustain such claims. Careful review of their arguments, however, reveals that there is little substance to such claims. The Petitioners now assert that the West Virginia courts have committed an additional constitutional violation by "failing to address" such claims in contravention of the Supremacy Clause. The case law cited in the Petition offers little support for this novel proposition.

Felder v. Casey, 487 U.S. 131 (1988) is cited by Petitioners for the proposition that the Supremacy Clause imposes on state courts a constitutional duty "to proceed in a manner that all the substantial rights of the parties under controlling federal law [are] protected." Petition at 10. At issue in that case, however, was Wisconsin's "notice-of-claim" statute which required a preliminary notice of a claim against a state officer or governmental entity in state court under 42 U.S.C. § 1983, or such action would be barred in Wisconsin's courts.

Likewise, in *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990) this Court reversed a dismissal by Florida's state courts of a § 1983 civil rights action against a local school board on the basis that the school board was absolutely immune from such § 1983 actions under state law. These cases are wholly inapplicable here. Both are § 1983 civil rights actions brought in state court which the states sought to dismiss or bar, pursuant to state law. In this case, Petitioners' claims were given full opportunity to be heard and considered, and not barred from consideration on state law immunity or limitation of actions grounds. To the contrary, the Harrison County Circuit Court explicitly acknowledged and rejected the plaintiff's constitutional claims because Petitioners failed to carry their burden of proof. Mem. of Decision, Findings of Fact 44; Conclusion of Law 4, 5 & 6, A. 46, *see also Folio v. Clarksburg*, 134 F.3d 1211, 1213 (1998) (A. 33). The West Virginia Supreme Court of Appeals also provided the Petitioners full opportunity to make their arguments, and acknowledged their claims in its opinion. Petitioners are correct that the court did not directly address Petitioners' constitutional claims in its opinion, apparently not deeming them of sufficient merit to warrant comment. This hardly is

analogous with the actions of Wisconsin and Florida in the cases cited, both of which sought to slam the door shut in the faces of individuals asserting violations of their civil rights.[2]

III.

THE FIRE PROTECTION SERVICE FEE ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE FEE BEARS A REASONABLE RELATIONSHIP TO A LEGITIMATE GOVERNMENTAL PURPOSE AND ALL PERSONS SIMILARLY SITUATED ARE TREATED EQUALLY.

Petitioners also charge that certain classifications made within Clarksburg's fire protection fee Ordinance are "arbitrary and devoid of any rationale," and therefore violate the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. Specifically, Petitioners assert that the Ordinance is not rationally related to its governmental purposes. The Ordinance makes distinctions between owner-occupied residential unit structures and

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2. It would appear that Petitioners have once again failed to appreciate the difference between a procedural bar to an opportunity to be heard and the failure to persuade a court of the correctness of a position. In the so-called "parallel action" before the district court the Petitioners argued that they had no "plain, speedy and efficient" remedy in West Virginia's courts and the Tax Injunction Act should not apply. This claim was flatly rejected. The Fourth Circuit noted that the Petitioners are not entitled to a guarantee of substantive relief, only procedural certainty that an opportunity will be provided to present federal challenges. *Folio v. Clarksburg*, 134 F.3d 1211, 1215 (1998) App. 38-39.

dual-residential structures which are assessed at a flat annual rate, while owner-occupied multi-family residential structures and non-residential structures are assessed a rate based on the square footage of the building. Tenants of non-residential structures are assessed a lesser rate based on square footage of the structure rented. (*See* Memorandum of Decision and Order, Finding of Fact No. 3, A.47). Petitioners assert, without any factual support in the record, that ". . . a pattern has emerged where commercial owners and tenants have been singled out to bear the brunt of the costs of fire protection without any basis for doing so." Petition at 29.

Under this Court's well established equal protection analysis, a state, or as in this case, a municipality acting under authority of a state statute, may establish reasonable classifications: "Unless a state-imposed classification warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

> In general, the equal protection clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger, 505 U.S. 1, at 11. (citations omitted). Since there is no suggestion that any suspect characteristic is at issue here, the only showing required of Clarksburg in order to sustain the classifications made by its Fire Protection Service Fee Ordinance is that it had a "plausible policy reason" in establishing the fee. Moreover, as noted by this Court in *Nordlinger*, "the equal protection clause does not demand for the purposes of rational basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. at 15, *citing United States Railroad Retirement Bd. v. Fritz*, 449 U.S. at 179.

In this case, the basis for the differing classifications within the Ordinance is expressly set forth in the Ordinance itself. The Clarksburg City Council made explicit legislative findings in the Ordinance that both the size and the use of a building are factors which directly affect the cost of providing fire protection. Council further found that firefighting in nonresidential buildings requires additional equipment and manpower. §§ 957.01(a) and (b). (*See* Appendix, *infra*).

Clearly the legislative finding by itself constitutes a sufficient "plausible policy reason" supporting the classifications of which Petitioners complain. Being prepared to fight fires in "Non-residential" commercial structures is clearly a more costly and demanding proposition to the city fire department than the protection of single family residential dwellings. For example, high rise buildings and hazardous materials contained in commercial or industrial structures present problems which are not a concern with single unit residential structures. Fires in multi-family residential units such as apartment

buildings, by the same token, may also present issues which require specialized training and equipment. Classification of these different types of structures is plainly reasonable and within the prerogative of the City in enacting its fee structure, insofar as equal protection analysis is concerned. Another "plausible policy reason" distinction for the flat rate imposed upon single and dual family residential structures is the avoidance by the city administration of the burden of determining and maintaining records of the square footage of each single family home and duplex within the city as well as the intrusion that such record creation and updating would have upon Clarksburg's homeowners.

Petitioners also complain that the Ordinance requires that tenants are assessed fire service protection fees under the tenant rate and that this creates a situation wherein owner-occupied structures pay less under the Ordinance than leased structures because both the owners and non-residential tenant structures are required to pay fees.

Petitioners refuse to recognize, however, that the tenants of non-residential property are also "users" of fire protection services. Such tenants have a clear interest in the protection of their property from fire, and thereby receive a tangible benefit from the operation of Clarksburg's Fire Department. It is entirely reasonable that Clarksburg imposes its fee upon these commercial tenants. There is no reason to believe that the machinery, inventory, equipment, computers and other property owned and maintained by commercial tenants is less important to its owner than the building in which it is housed is to its landlord. The question is not whether any persons are treated differently under the Ordinance, but rather, whether there is a rational basis for doing so.

Contrary to Petitioners' assertions, the classifications are neither arbitrary nor capricious. Rather they plainly rest upon reasonable distinctions which are closely tied to the governmental purpose of the Ordinance: to defray the cost of providing fire protection to owners of both residential and nonresidential structures. There has been no denial of equal protection of the law.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

GREGORY A. MORGAN
Counsel of Record
YOUNG MORGAN & CANN, PLLC
Attorneys for Respondent
Suite One, Schroath Building
229 Washington Avenue
Clarksburg, West Virginia 26301
(304) 624-5687

APPENDIX

APPENDIX — EXCERPTS FROM ARTICLE 957, CHAPTER 5, PART 9 OF THE CODIFIED ORDINANCES OF THE CITY OF CLARKSBURG, WEST VIRGINIA

ARTICLE 957

MUNICIPAL FIRE AND SOLID WASTE COLLECTION CHARGE

957.01 *CONTINUANCE, MAINTENANCE AND IMPROVEMENT OF FIRE PROTECTION SERVICE AND WASTE COLLECTION SERVICE; LEGISLATIVE PURPOSE*

The service of fire protection and the service of waste collection shall be continued, maintained and improved by the City, in part, at the charge and expense of the owners of buildings and structures of every kind and nature within the City, the occupiers or tenants of such buildings and structures, and the owners of vehicles within the City, which owners and occupiers are declared to be the users and beneficiaries of such fire protection service as contemplated by West Virginia Code 8-13-13.

The charges and expenses with respect to each of such users as set out in this article shall be based and imposed, in part, upon recognition of the following legislative findings:

(a) The size of a building, as reflected by the total square feet, is a factor which affects the cost of providing fire protection and therefore the fees imposed hereunder are related in part to the size of a building.

Appendix

(b) The use of a building is a factor which affects the cost of providing fire protection and accordingly nonresidential property as compared to residential property requires additional equipment and manpower to provide effective fire protection and therefore it is the intent of this article that owners and occupiers of residential buildings pay a lesser charge for fire protection to reflect the reduced cost of protections.

The legislative intent and purposes for both the fire protection service charge approved and adopted in 1983 and Solid Waste Collection charge approved and adopted in 1979 are hereby adopted as continuing. The charges imposed, assessed and levied herein are in accordance with this intent.

* * * *